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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BERNARDO COLON, Defendant and Appellant.	F056334 (Super. Ct. No. BF113998A) Kern County **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Carol A. Navone, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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SEE DISSENTING OPINION

INTRODUCTION

Defendant Bernardo Colon was charged with count 1, possession of a controlled substance, phencyclidine (PCP) (Health & Saf. Code, § 11377, subd. (a)); count 2, misdemeanor driving with a suspended or revoked license (Veh. Code,[1] § 14601.1, subd. (b)(1)), with the special allegation that he had three prior convictions for the same offense within the previous five years (§ 14601.1, subd. (b)(2)); and count 3, misdemeanor attempting to elude a peace officer (§ 2800.1). As to count 1, it was further alleged defendant had two prior serious and/or violent felony convictions within the meaning of the Three Strikes law. (Pen. Code, §§ 667, subds. (c)-(j) & 1170.12).

After a jury trial, defendant was found guilty as charged and the court found true the two prior strike convictions. The court denied defendant's motion to dismiss the prior strike convictions pursuant to Penal Code section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), and imposed the third strike term of 25 years to life for count 1, possession of a controlled substance.

On appeal, defendant contends the trial court improperly admitted a criminalist's report that the substance seized from him contained PCP, and argues the admission of the report in the absence of the testing criminalist's testimony violated his Sixth Amendment right to confront and cross-examine witnesses. Defendant also contends the court abused its discretion when it failed to dismiss one or both prior strike convictions, and the imposition of an indeterminate life term constituted cruel and/or unusual punishment in violation of the United States and California Constitutions. We will affirm.

FACTS

Around 9:50 p.m. on March 12, 2006, Bakersfield Police Officers Dillard and Carruesco were on patrol in a marked squad car on Kentucky Street when they saw a

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[1] All further statutory citations are to the Vehicle Code unless otherwise indicated.

Dodge Neon traveling in the opposite direction. The officers were aware that a Dodge Neon recently had been reported stolen, so Carruesco performed a U-turn and followed the car. The Dodge, which was driven by defendant, made several turns and the officers continued to follow it. The speed limit was 25 miles per hour, but the officers paced defendant's car at 35 miles per hour. Defendant accelerated away from the patrol car. The officers activated the patrol car's siren and flashing lights to conduct a traffic stop, but defendant did not pull over.

A brief pursuit ensued for about one mile, as defendant made numerous turns, violated several traffic laws, and accelerated to 45 miles per hour. Defendant was driving on streets which would have easily allowed him to pull to the side of the road, but he failed to heed the patrol car's siren and flashing lights. The pursuit lasted one to two minutes, and ended when defendant turned into a residential area, slowed down, and parked in front of the apartment complex where he lived.

The officers used the patrol car's loudspeaker to order the occupants out of the vehicle. Defendant and two passengers complied with the officers' orders and stepped out of the car. Defendant was immediately taken into custody. A woman emerged from the residence and introduced herself as defendant's wife.

The officers determined the Dodge was not stolen but that defendant was driving on a suspended or revoked license. Officer Dillard advised defendant of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, defendant said he understood and waived his rights, and Dillard asked defendant why he failed to pull over when the officers initiated the siren and lights. Defendant replied that he did not know the officers were trying to pull him over, and he just thought they were trying to go around him. Dillard asked: "[S]o when we first turned on our lights and sirens … you didn't think we were trying to pull you over?" Defendant did not reply.

Officer Carruesco searched defendant and found a small piece of a plastic baggie in defendant's right front pants pocket. The baggie contained a white crystalline-like substance about "the size of a pencil eraser, not much bigger." Carruesco believed the substance was crystal methamphetamine, which is similar in appearance to PCP. On cross-examination, Carruesco reviewed his report and conceded he might have found the substance in the smaller coin pocket of defendant's pants and not the regular pocket. Also on cross-examination, Carruesco acknowledged he did not find any drug paraphernalia on defendant or in the car.

The criminalist's trial testimony

At trial, the prosecution introduced evidence that the white crystalline-like substance found in defendant's pocket contained PCP, based on the testimony of Jeanne Spencer, the lead criminalist for the drug section of the major crimes unit at the Kern County Regional Crime Laboratory, who supervised the daily operations of the drug section.

Spencer testified extensively about the policies and procedures followed by members of the laboratory to test items for controlled substances. Spencer had personally conducted over one hundred tests to determine if substances consisted of phencyclidine (PCP). Spencer testified the specific testing procedures followed by the criminalists in Kern County's crime laboratory are standard in the industry. The testing criminalist will open the sealed evidence envelope received from law enforcement, weigh the material, conduct a color test for PCP, and then confirm the results with the micro-crystalline test. The testing criminalist might also conduct an instrument analysis with a gas chromatograph spectrometer. Spencer testified the testing criminalist will make notes as to each stage of the analysis, and explained it was part of laboratory policy to "document basically everything we do."

Spencer supervised the daily operations in the laboratory's drug section, and testified Allison Kennedy, another criminalist in the same unit, conducted tests on the substance found in defendant's pocket to determine if it was a controlled substance.[2] Spencer testified that Kennedy took notes about her analysis of the substance and prepared a report about the results. Spencer reviewed Kennedy's notes and report, and testified there was no indication that anything unusual occurred during the analysis.

At this point in Spencer's testimony, the prosecutor asked the court to admit Kennedy's notes and report through Spencer's testimony, pursuant to the official records exception to the hearsay rule (Evid. Code, § 1280). The court asked defense counsel if she would submit the matter. Defense counsel declined to submit to the admission of the documents until she heard the rest of Spencer's testimony. The court reserved ruling on the prosecutor's motion and the prosecutor continued with Spencer's direct examination.

Spencer testified that according to Kennedy's notes and report, the substance seized from defendant's pocket contained PCP. Spencer reviewed Kennedy's notes which confirmed the chain of custody, that the item being tested was the material seized from defendant's pocket. Spencer testified that Kennedy performed color screening tests which showed the substance contained PCP, and then conducted two micro-crystalline tests which confirmed the presence of PCP, all of which were consistent with the laboratory's protocol. Kennedy's notes and report stated the substance and packaging seized from defendant's pocket weighed 0.20 grams, the substance itself weighed 0.1982 grams, and a portion of the substance contained PCP. Spencer testified the substance was a usable amount that could be handled and manipulated, and it did not simply consist of

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[2] In issue I, *post*, we will discuss defendant's contentions that the prosecution's introduction of evidence about the test results for the contraband through Spencer's testimony, and the failure to call Kennedy, the testing criminalist, violated his Sixth Amendment right to confront and cross-examine witnesses.

residue on a baggie. Spencer testified that a photograph was taken of the item of evidence which Kennedy tested.

On cross-examination, defense counsel asked Spencer whether she tested the substance herself or supervised Kennedy's work. Spencer testified she did not oversee Kennedy's tests, and she did not perform additional tests or analysis of the item found in defendant's pocket. Defense counsel asked if there was any material left to conduct another analysis. Spencer testified there was "plenty of material left to be re-analyzed," and the remaining amount was returned to the Bakersfield Police Department.

Defense counsel asked Spencer whether the substance consisted of a usable amount of a controlled substance. Spencer explained that a useable amount meant whether the substance had the potential for use or sales.

> "[Defense counsel] The analysis of this particular item tells you that there is a weight of .1982 grams of a substance and a portion there of it contains phencyclidine. Is that right?
>
> "A. That's correct.
>
> "Q. So not everything according to this analysis that's contained in the .1982 grams is in fact phencyclidine?
>
> "A. That's correct."

On redirect examination, the prosecutor asked Spencer about Kennedy's training and qualifications. Spencer testified that Kennedy joined the crime laboratory in 1999, she finished her training in 2003, and she had been conducting tests on controlled substances since that time. Spencer again testified that she did not conduct the tests on the substance, but explained that she was responsible for conducting both the technical and administrative reviews of Kennedy's tests in this case, and Kennedy's work passed the two-step review process. In the technical review, Spencer examined all of the data "to make sure it supports the conclusion that was reached. Then administratively I look to

see if all the laboratory policies and procedures and protocols were followed, things like that."

At the conclusion of Spencer's testimony, the prosecutor moved all the exhibits into evidence, including Kennedy's notes and report. Defense counsel did not object and submitted the matter, and the court admitted the exhibits into evidence.

Defense evidence

Cecilia Sandoval testified she lived with defendant. Sandoval testified that on the night of the incident, defendant returned from work, took a shower, and wore a pair of pants which he had just purchased from the Goodwill store on Union Avenue. Sandoval testified defendant had not laundered or worn those pants prior to that evening. Sandoval testified that later in the evening, defendant's coworkers arrived at their residence to get paid. Defendant and his friends left for the bank, and defendant intended to withdraw cash from the ATM to pay them.

The defense introduced evidence as to the police department's dispatch records of the pursuit of defendant, and that the attempted traffic stop began at 9:50 p.m. and the patrol units were cleared at 9:51 p.m., which meant the pursuit ended at that time. A defense investigator testified as to defendant's route while the officers followed him, and testified that defendant traveled a short distance between the beginning of the pursuit and when he arrived at his residence.

The defendant also introduced evidence about an unrelated incident to question Officer Carruesco's credibility. The incident occurred when Carruesco was on patrol at the Kern County Fair. Eric Barefield, an African-American, testified that he was just walking through the fair when Carruesco physically grabbed him, improperly escorted him out of the fair, and used a racial slur against him. In rebuttal, the prosecutor recalled the defense investigator, who testified that he interviewed Barefield about the incident at the fair, and Barefield was unable to identify the officer who made the racial slur. The

prosecutor also recalled Officer Carruesco, who testified that Barefield was part of a larger group which was blocking foot-traffic at the fair. Carruesco and his partner tried to break up the group, Barefield became argumentative, and his partner decided to remove Barefield from the fair. Carruesco testified that neither he nor his partner called Barefield any names, and Carruesco was not reprimanded for the incident.

The prosecutor's closing argument

In her closing argument, the prosecutor argued the evidence established beyond a reasonable doubt that defendant was guilty of count I, possession of PCP, because defendant had "actual possession" of the drugs in his pocket. "It was actually on his person and we know that he had some ability to control that particular substance that was in his pants pocket." The prosecutor further argued the substance was in an amount sufficient to be used as a controlled substance, and cited to Spencer's testimony that the contraband in defendant's pocket "was indeed PCP and was in a useable amount" based on her expertise.

The prosecutor acknowledged that "we didn't hear from the actual criminalist who performed the analysis but we heard from someone who supervises her and reviewed the case. And indeed with all those different tests, the screening tests, the confirmatory test, that substance was indeed PCP, an illegal substance."

The prosecutor addressed the other elements of count I, as to whether defendant knew of the presence and narcotic nature of the substance in his pocket. The prosecutor argued defendant's evasion of the officers constituted the "most telling evidence" that he knew PCP was in his pocket. The prosecutor conceded defendant did not lead the officers on a lengthy high-speed chase, but "what we know is that both officers believed that the defendant was indeed trying to evade them," and he failed to yield or stop after the officers activated the patrol car's siren and flashing lights. Defendant's failure to stop "just doesn't make any sense …. He knew that this PCP was in his pocket and he was

thinking on his feet. How was he gonna get out of this? How was he gonna get out of this? Until it became apparent to him he wasn't gonna be able to get out of this." The prosecutor argued defendant's evasive conduct also showed he knew the item in his pocket was a controlled substance "[b]ecause he was trying to get away from the police and not get caught."

The prosecutor also addressed the testimony of defendant's girlfriend, that he was wearing pants that he just purchased from a thift store, and challenged the defense's suggested inference that "you get free dope with your jeans from second-hand stores. That drug users are gonna leave their drugs in their pants before they give them away to charity. That's just not reasonable."

Defense counsel's closing argument

Defense counsel used closing argument to challenge the credibility of the officers as to whether defendant tried to elude them during the brief pursuit, or he was just trying to drive home. Counsel noted that defendant did not accelerate to high speeds, he traveled less than one mile, and the entire sequence did not exceed sixty seconds. Counsel argued that once defendant parked his car, he was completely cooperative and his actions were consistent with his statements to the officers, that he did not realize they were trying to pull him over and instead thought the patrol car wanted to pass him.

Defense counsel argued defendant did not know the item was in his pocket and cited the testimony of defendant's girlfriend, that defendant just purchased the pants from a second-hand store and had never worn or laundered them. Counsel noted her testimony about the pants was uncontroverted and she had no reason to commit perjury. Defense counsel also cited conflicts in Officer Carruesco's testimony as to whether he found "the item of suspected contraband" in defendant's right front pants pocket or the smaller coin pocket, and noted that even Carruesco described the item as "no bigger than the pencil on an eraser." Counsel argued Carruesco was "wrong about *the drug*," and wrong "about its

location," presumably referring to Carruesco's testimony that he thought the item was in the front pants pocket and it was methamphetamine. (Italics added.)

Defense counsel argued it was reasonable to conclude that defendant did not know such a small item was in the coin pocket of his newly-purchased pants because it was "uncontroverted" that "this item is very small . . . about the size of a pencil eraser." Counsel noted defendant did not possess any drug paraphernalia, which also supported the conclusion that he did not know the item was in the pocket.

Defense counsel reminded the jury that as to count I, possession of PCP, that "[j]ust because it's in his pocket is not enough. He must know it's in his pocket."

> "There was an argument that the whole reason why there is this process of not stopping is because he's thinking on his feet. And I tell you that that argument holds no water and this is why. There's two other individuals in this car. If he's taking this time to evade because he's thinking on his feet—thinking on his fee[t] would have been taking it out of the coin pocket, tossing it somewhere else in the car where you can claim that it was from somebody else. That's not thinking on his feet."

Defense counsel cited the defense evidence as to defendant's route and the distance he traveled, and argued it was reasonable to conclude defendant did not pull over for the officers, either because he did not realize the officers were there right away, or he knew he was driving on a suspended or revoked license and he was trying to get home and park the car. "It's a fact uncontroverted that his pants were second-hand, new to him. It's a fact uncontroverted that this item is very small, smaller than the tip—about the size of a pencil eraser." Counsel concluded there was reasonable doubt as to the elements of the offense.[3]

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[3] As we will discuss, *post*, defense counsel did not use closing argument to address the criminalist's testimony or the accuracy of the tests which indicated the substance in defendant's pocket was PCP.

DISCUSSION

I. Admission of the Criminalist's Report

Defendant contends the prosecution's evidence that the substance in his pocket contained PCP was testimonial within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), and his Sixth Amendment rights were violated because Spencer, the supervising criminalist who testified in this case, did not conduct the tests on the substance, and Kennedy, the testing criminalist, did not testify at trial and was not available for cross-examination.

A. *Crawford, Geier, and Melendez-Diaz*

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., amend. VI.) The admission of an unavailable witness's out-of-court statements against a criminal defendant was previously governed by *Ohio v. Roberts* (1980) 448 U.S. 56 (*Roberts*), which held that such statements could be admitted consistent with the confrontation clause only when the evidence fell within "a firmly rooted hearsay exception," or the statements contained "particularized guarantees of trustworthiness" such that adversarial testing would add little to the statements' reliability. (*Id*. at p. 66.)

In *Crawford v. Washington*, *supra*, 541 U.S. 36 (*Crawford*), the United States Supreme Court repudiated *Roberts* and held testimonial out-of-court statements offered against a criminal defendant are inadmissible under the Sixth Amendment unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Id*. at pp. 59, 68.) Where nontestimonial hearsay is at issue, evidence is exempt "from Confrontation Clause scrutiny altogether" and may be admitted pursuant to the hearsay law. (*Id*. at p. 68.)

Crawford left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" but held that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (*Crawford, supra,* 541 U.S. at p. 68.)[4]

In *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), the court expanded upon *Crawford* and offered the following explanation of testimonial statements under the Sixth Amendment:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis, supra,* 547 U.S. at p. 822.)

Davis relied upon and applied these distinctions to two factual situations to determine "when statements made to law enforcement personnel during a 911 call or at a crime scene are 'testimonial' and thus subject to the requirements of the Sixth Amendment's Confrontation Clause." (*Davis, supra,* 547 U.S. at p. 817.) *Davis* held the tape recording of a domestic disturbance victim's telephone call to a 911 operator was admissible and not testimonial under *Crawford,* even though the 911 operator asked the victim questions about the incident, because a 911 call "is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." (*Davis, supra,* 547 U.S. at pp. 827, 817-819.) The victim on

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[4] The erroneous admission of statements in violation of a defendant's Sixth Amendment rights is subject to a harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.)

the 911 call was "speaking about events *as they were actually happening*, rather than 'describ[ing] past events' … [citation]." (*Id.* at p. 827, italics in original.) In contrast, *Davis* held that in the companion case, a domestic violence victim's statements to police officers, given in the course of their investigation, were testimonial and inadmissible in the absence of the victim's trial testimony, because the victim spoke to officers about the assault after the incident happened, she gave her statements to the officers as part of an investigation into possible past criminal conduct, there was no emergency in progress, and no immediate threat to the victim. (*Id.* at pp. 829-830, 819-821.)

In *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), the California Supreme Court held an expert could testify about the results of DNA tests, even if that expert did not conduct the actual tests, without violating *Crawford* and the defendant's Sixth Amendment rights. The prosecution's expert in *Geier* was the laboratory director for an accredited private laboratory that performed DNA tests for both the prosecution and defense, and the director reviewed the work performed by the analyst who conducted the actual tests. Defendant objected to the expert's testimony and argued the evidence violated his Sixth Amendment rights because the expert did not conduct the tests. (*Geier, supra,* 41 Cal.4th at pp. 593-596.)

Geier reviewed *Crawford* and *Davis* as to the determination of whether a statement is testimonial under the Sixth Amendment and held: "[W]hat we extract from those decisions is that a statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial." (*Geier, supra,* 41 Cal.4th at p. 605.)

Based on this interpretation, *Geier* held the circumstances under which the testing analyst prepared the DNA report meant such evidence was not testimonial under *Crawford* and *Davis*. (*Geier, supra,* 41 Cal.4th at p. 607.) *Geier* held the report was not

testimonial because it contained the analyst's observations as she actually performed the tests and thus constituted "*a contemporaneous recordation of observable events rather than the documentation of past events.*" (*Id.* at p. 605, italics added.) *Geier* acknowledged the DNA report was requested by a police agency and the laboratory's employees were paid for their work as part of a government investigation. (*Ibid.*) However, *Geier* held "'the proper focus [about whether an out-of-court statement is testimonial] is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial.' [Citations.]" (*Ibid.*)

> "In our view, under *Davis,* determining whether a statement is testimonial requires us to consider the circumstances under which the statement was made. As we read *Davis,* the crucial point is *whether the statement represents the contemporaneous recordation of observable events*." (*Id.* at p. 607, italics added.)

Geier held the analyst's notes were admissible because they "were made 'during a routine, non-adversarial process meant to ensure accurate analysis.' [Citations.] In simply following [the laboratory's] protocol of noting carefully each step of the DNA analysis, recording what she did with each sample received, [the analyst] did not 'bear witness' against defendant. [Citation.] Records of laboratory protocols followed and the resulting raw data acquired are not accusatory. 'Instead, they are neutral, having the power to exonerate as well as convict.' [Citation.]" (*Geier, supra,* 41 Cal.4th at p. 607.) In the alternative, *Geier* held that even if the testifying expert's reliance on the DNA report violated defendant's Sixth Amendment rights, any error was harmless given other evidence which clearly connected defendant to the crime. (*Id.* at p. 608.)

In *Melendez-Diaz v. Massachusetts* (2009) __ U.S. __ [129 S.Ct. 2527] (*Melendez-Diaz*), a case decided after defendant was convicted but while the instant appeal was pending, the United States Supreme Court held that documentary evidence stating that certain contraband tested positive for cocaine constituted "testimonial" evidence, and was

inadmissible in the absence of the trial testimony of the analysts who performed such tests, pursuant to the Confrontation Clause of the Sixth Amendment. (*Id.* at p. 2532.) The petitioner was found in possession of bags containing a substance that resembled cocaine. (*Id*. at p. 2530.) The prosecution introduced three notarized "'certificates of analysis'" which showed the results of forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags, and that the substances were examined and found to contain cocaine. The certificates complied with state law and were sworn to before a notary public by analysts from the state's crime laboratory, but no analysts testified at trial. (*Id.* at p. 2530-2531.) The petitioner objected to the certificates and argued the evidence was testimonial and violated his Sixth Amendment rights under *Crawford*, but the trial court overruled the objection and held the analysts who tested the contraband were not required to appear at trial. (*Id.* at p. 2531.)

Melendez-Diaz held the admission of the certificates, in the absence of the trial testimony of the analysts who tested the contraband, violated petitioner's Sixth Amendment rights because there was "little doubt" the certificates fell "within the 'core class of testimonial statements'" subject to the Sixth Amendment restrictions described in *Crawford*. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532.) "The 'certificates' are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.' [Citation.]" (*Ibid.*) While state law described the documents as "'certificates,'" *Melendez-Diaz* held they were "quite plainly affidavits" and """made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."' [Citation.]" (*Ibid.*) Moreover, the "*sole purpose*" of the affidavits under state law "was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance [citation]." (*Ibid.*, italics in original.)

Melendez-Diaz noted that its decision "involved little more than the application of our holding in *Crawford."* (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2542.) "In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to '"be confronted with"' the analysts at trial. [Citation.]" (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2532, italics in original.) *Melendez-Diaz* noted the affidavits submitted by the analysts "contained only the bare-bones statement that '[t]he substance was found to contain: Cocaine.' [Citations.] At the time of trial, petitioner did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." (*Melendez-Diaz, supra,* 129 S.Ct. at pp. 2537-2538.)

Melendez-Diaz maintained that it was not holding that "anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case," or that "everyone who laid hands on the evidence must be called." (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2532, fn. 1.) The court explained that "'gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility.' It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (*if the defendant objects*) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records. [Citation.]" (*Ibid.*, first italics in original, second italics added.)

Justice Scalia's plurality opinion in *Melendez-Diaz* was joined by three other justices. Justice Thomas filed a short concurring opinion, which stated that he joined the

court's opinion "because the documents at issue in this case 'are quite plainly affidavits,' [citation]. As such, they 'fall within the core class of testimonial statements' governed by the Confrontation Clause. [Citation.]" (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2543 (conc. opn. of Thomas, J.), italics added.)[5]

At the time the United States Supreme Court decided *Melendez-Diaz,* a petition for writ of certiorari in *Geier* was pending before the court. The court denied certiorari in *Geier,* without comment, four days after deciding *Melendez-Diaz.* (*Geier v. California* (2009) __ U.S. __ [129 S.Ct. 2856].)

On the same day the court denied certiorari in *Geier*, it granted review in another case which involved a similar issue, *Magruder v. Commonwealth* (2008) 275 Va. 283 [657 S.E.2d 113], cert. granted *sub. nom. Briscoe v. Virginia* (2009) __ U.S. __ [129 S.Ct. 2858].) In that case, the Virginia Supreme Court held a defendant's Sixth Amendment rights were protected under a statutory procedure which allowed the prosecution to introduce certificates of analysis as to the results of laboratory tests performed on contraband, and also provided the defendant with the right to call the forensic analyst as an adverse witness to testify about the results. The Virginia Supreme Court held such a procedure allowed the defendant to confront and cross-examine the forensic analyst, and further held the defendant's failure to call the analyst as an adverse witness resulted in a waiver of any Sixth Amendment objection under *Crawford*. (*Magruder v.*

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5 The four dissenting justices in *Melendez-Diaz* complained the majority swept away "an accepted rule governing the admission of scientific evidence" that had been in existence for at least 90 years, whereas *Crawford* and *Davis* said "nothing about forensic analysts …." (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2543 (dis. opn. of Kennedy, J.).) The dissent concluded that *Crawford*'s definition of testimonial evidence should be limited to "conventional" witnesses who have "personal knowledge of some aspect of the defendant's guilt …." (*Ibid.*)

Commonwealth, *supra*, 275 Va. at pp. 295, 297-302, 304-305 [657 S.E.2d at pp. 119, 120-123, 124-125].)

In January 2010, the United States Supreme Court heard oral argument in the case but just two weeks later, it summarily vacated the judgment of the Virginia Supreme Court and remanded the matter "for further proceedings not inconsistent with the opinion" in *Melendez-Diaz*, without issuing an opinion. (*Briscoe v. Virginia* (2010) No. 07-11191 __ U.S. __ [__ S.Ct. __, 2010 U.S. Lexis 767 [2010 WL 246152]].)

B. Competing views of *Melendez-Diaz*

The potential conflict between *Melendez-Diaz* and *Geier* is pending before the California Supreme Court, which has granted petitions for review in a series of appellate decisions which reached different conclusions on the issue. (See *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047 [98 Cal.Rptr.3d 390] review granted Dec. 2, 2009, S176213 [*Melendez-Diaz* did not overrule *Geier*]; *People v. Gutierrez* (2009) 177 Cal.App.4th 654 [99 Cal.Rptr.3d 369] review granted Dec. 2, 2009, S176620 [*Melendez-Diaz* did not overrule *Geier*]; cf. *People v. Lopez* (2009) 177 Cal.App.4th 202 [98 Cal.Rptr.3d 825] review granted Dec. 2, 2009, S177046 [*Melendez-Diaz* overruled *Geier*]; *People v. Dungo* (2009) 176 Cal.App.4th 1388 [98 Cal.Rptr.3d 702] review granted Dec. 2, 2009, S176886 [*Melendez-Diaz* overruled *Geier*].)

One of the cases currently pending before the California Supreme Court is particularly noteworthy because of the court's limited grant of review. In *People v. Rutterschmidt*, *supra*, 98 Cal.Rptr.3d 390, the Second District, Division 5, addressed contentions raised by two codefendants, Rutterschmidt and Golay, as to whether *Melendez-Diaz* overruled *Geier*. *Melendez-Diaz* had not been decided at the time of the defendants' joint jury trial. The trial court admitted the testimony of a toxicology expert about tests conducted on a homicide victim, but that expert did not conduct the actual

tests. At trial, Golay raised a Sixth Amendment objection but Rutterschmidt did not object.

On appeal, both defendants argued the expert's testimony violated the Sixth Amendment and *Melendez-Diaz,* which was decided after defendants were convicted. The court held one defendant, Rutterschmidt, failed to preserve the Sixth Amendment issue for appellate review because she did not raise a confrontation clause objection to the evidence during trial, whereas the defendant in *Melendez-Diaz* raised a timely Sixth Amendment objection the introduction of the certificates in that case. In addition, the court found there were no extraordinary circumstances to excuse Rutterschmidt's failure to raise a confrontation clause objection at trial, and declined to address her Sixth Amendment contentions on appeal. (*People v. Rutterschmidt, supra,* 98 Cal.Rptr.3d 390 at pp. 408, 410, 412 & fn. 13.) The court also rejected defendant Rutterschmidt's belated attempt to argue that defense counsel was ineffective for failing to object, because she did not raise the ineffective assistance claim in her opening brief on appeal and only raised it for the first time in her reply brief. (*Id*. at p. 410 & fn. 12.) In contrast, the court held that codefendant Golay preserved the *Melendez-Diaz* issue for appellate review because she made a Sixth Amendment objection when the toxicology evidence was introduced at trial. The court ultimately held that *Melendez-Diaz* did not overrule *Geier*.

Both defendants in *Rutterschmidt* filed petitions for review and argued *Melendez-Diaz* overruled *Geier*. The California Supreme Court granted defendant Golay's petition for review on the Sixth Amendment issue. However, the court denied without comment the petition for review filed by codefendant Rutterschmidt, who had failed to make a Sixth Amendment objection at trial or a timely ineffective assistance argument on appeal. (*People v. Rutterschmidt, supra,* 98 Cal.Rptr.3d 390.)

C. Analysis.

Defendant contends that as in *Melendez-Diaz*, his Sixth Amendment rights were violated in this case because the prosecution's evidence that the substance in his pocket contained PCP was testimonial, the testifying criminalist, Spencer, did not conduct the actual tests, and the testing criminalist, Kennedy, was not called as a witness and was not subject to cross-examination.

We reject defendant's contentions for three reasons: defense counsel failed to object and waived review of the Sixth Amendment issue, counsel's failure to object was based on a tactical decision, and, even if the issue was preserved for review, the evidence was properly admitted.

Waiver

It is undisputed that defendant failed to raise a Sixth Amendment objection to the criminalist's trial testimony. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' [Citation.]" (*U.S. v. Olano* (1993) 507 U.S. 725, 731.) A claim that the introduction of evidence violated the defendant's rights under the confrontation clause must be timely asserted at trial or it is waived on appeal. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028, fn. 19; *People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1044 [failure to object waives appellate review of alleged error based on *Bruton v. United States* (1968) 391 U.S. 123 and *People v. Aranda* (1965) 63 Cal.2d 518]; *People v. Chaney* (2007) 148 Cal.App.4th 772, 777-779.) As we will explain, we find defense counsel waived a Sixth Amendment objection in this case.[6]

[6] "Over the years, cases have used the word [waiver] loosely to describe two related, but distinct, concepts: (1) losing a right by failing to assert it, more precisely

Melendez-Diaz itself specifically addressed the defendant's obligation to preserve review of confrontation clause issues, and held "[t]he defendant *always* has the burden of raising his Confrontation Clause objection …." (*Melendez-Diaz, supra,* 129 S.Ct. 2527, 2541, italics in original.) *Melendez-Diaz* further held that "[t]he right to confrontation may, of course, be waived, including by failure to object to the offending evidence …." (*Id*. at p. 2534, fn. 3.) "It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (*if the defendant objects*) be introduced live." (*Id*. at p. 2532, fn. 1, first italics in original, second italics added.)

Defendant argues that his failure to object should be excused because *Geier* was the controlling precedent at the time of trial, and *Melendez-Diaz*'s analysis of the Sixth Amendment could not have been anticipated. We note that *Crawford* was retroactively applied to cases which were pending on direct appeal when it was decided, because it repudiated *Roberts* and announced a new rule on the effect of the confrontation clause on hearsay statements. (See, e.g., *Schriro v. Summerlin* (2004) 542 U.S. 348, 351; *Griffith v. Kentucky* (1987) 479 U.S. 314, 328; *People v. Cage* (2007) 40 Cal.4th 965, 970; *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1400; cf. *Whorton v. Bockting* (2007) 549 U.S. 406, 409, 421 [*Crawford* not retroactive to cases on collateral review].) A defendant who failed to raise a Sixth Amendment trial objection prior to the decision in *Crawford* did not waive review of the issue on direct appeal, since the United States Supreme Court's

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called forfeiture; and (2) intentionally relinquishing a known right. '[T]he terms "waiver" and "forfeiture" have long been used interchangeably. The United States Supreme Court recently observed, however: "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' [Citations.]" (*United States v. Olano* [(1993) 507 U.S. 725, 733 . . .].)' (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6 ….)" (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.)

opinion in *Roberts* was the "governing law at the time" and "afforded scant grounds for objection. [Citation.]" (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn. 2.)

Defendant's extension of this argument to *Melendez-Diaz*, however, lacks merit based on the Supreme Court's own characterization of its ruling. *Crawford* announced that *Roberts* had been overruled and the "sufficient indicia of reliability" test abandoned. *Davis* clarified aspects of *Crawford* and further defined "testimonial" hearsay. In contrast, *Melendez-Diaz* repeatedly emphasized its holding was not new, that it was "faithfully applying *Crawford* to the facts of this case," and rejected the dissent's assertion that it was "overruling 90 years of settled jurisprudence. It is the dissent that seeks to overturn precedent by resurrecting *Roberts* a mere five years after it was rejected in *Crawford*." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2533.)

Melendez-Diaz specifically stated that its ruling "involves little more than the application of our holding" in *Crawford.* (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2533.) "[U]nder our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment," and there was "little doubt that the documents at issue" fell within "the 'core class of testimonial statements'" described in *Crawford*. (*Id*. at p. 2532.)

We note that the dissent relies on *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*) to argue that defendant did not forfeit or waive review of the Sixth Amendment issue in this case, because defense counsel could not have foreseen the development of law in *Melendez-Diaz,* contrary to controlling authority at the time of trial. This argument is based upon the proposition that *Melendez-Diaz* overruled *Geier*. As we will explain, *post*, we respectfully disagree that *Geier* has been overruled. Moreover, the important principle discussed in *Sandoval* was relevant to the situation where a defendant failed to make a Sixth Amendment objection at trial, and *Crawford* was decided while the case was pending on appeal. In that case, a defendant's failure to

object did not result in waiver of the Sixth Amendment issue on appeal since the United States Supreme Court's opinion in *Roberts* was the "governing law at the time" and "afforded scant grounds for objection. [Citation.]" (*People v. Johnson, supra,* 121 Cal.App.4th 1409, 1411, fn. 2.)

In the case before us, however, we cannot ignore the express language of *Melendez-Diaz*, as discussed *ante*, which repeatedly stated that its holding was not new, it was "faithfully applying *Crawford* to the facts of this case," and its ruling "involves little more than the application of our holding" in *Crawford.* (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2533.)

Melendez-Diaz thus leads to the conclusion that defendant's failure to raise a Sixth Amendment objection to Spencer's testimony and Kennedy's notes necessarily waived review of the confrontation clause issue in this case because, as we will discuss, *post*, the record strongly indicates defense counsel made a tactical decision on this point.

Ineffective Assistance

Defendant raises the alternative argument that counsel's failure to object constituted ineffective assistance of counsel. "In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 214-215.)

"If 'counsel's omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed.' [Citation.] When, however, the record sheds no light on why counsel acted or failed to act in the manner challenged,

the reviewing court should not speculate as to counsel's reasons. To engage in such speculations would involve the reviewing court '"in the perilous process of second-guessing."' [Citation .] Because the appellate record ordinarily does not show the reasons for defense counsel's actions or omissions, a claim of ineffective assistance of counsel should generally be made in a petition for writ of habeas corpus, rather than on appeal. [Citation.]" (*People v. Diaz* (1992) 3 Cal.4th 495, 557-558.) If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; *People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069.)

The failure to object is considered a matter of trial tactics "as to which we will not exercise judicial hindsight. [Citation.]" (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) We defer to counsel's tactical decisions in examining ineffective assistance claims and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation]." (*Strickland v. Washington* (1984) 466 U.S. 668, 689; *People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) "'Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 980.)

Defendant contends his defense counsel should have raised a Sixth Amendment objection to Spencer's testimony and Kennedy's report. At the time of defendant's trial in January 2008, *Crawford* and *Davis* had been decided, and *Geier* was the controlling authority in this state as to the application of *Crawford* to laboratory test results.

However, *Geier* itself noted a division among state courts as to the application of *Crawford* to scientific evidence. (*Geier, supra,* 41 Cal.4th at pp. 604-607.) Moreover, a petition for writ of certiorari in *Geier* was pending before the United States Supreme Court at the time of defendant's trial. (*Geier v. California, supra,* ___ U.S. ___ [129 S.Ct. 2856] [petition for writ of certiorari denied Nov. 21, 2007].)

The entirety of the record demonstrates defense counsel made a tactical decision not to raise a Sixth Amendment objection to Spencer's testimony. In closing argument, defense counsel framed the contested issue as whether defendant knew about the presence and nature of the small item in his pocket. Counsel had developed evidence to support this theory, based upon the testimony of defendant's girlfriend, that he just bought the pants from a second-hand store, and he had not laundered or worn the pants prior to that night. The defense theory was further bolstered by defense counsel's vigorous cross-examination of Officer Carruesco as to his search of defendant and where he found the item. Carruesco reviewed his report and conceded the substance might have been in the small coin pocket of defendant's pants rather than the larger front pocket. Defense counsel also seized upon Carruesco's description of the substance as being as small as the eraser on the tip of the pencil. Carruesco's description was confirmed by the photograph of the item itself, which the prosecution introduced into evidence as part of Kennedy's report about the laboratory analysis, all without objection by defense counsel.

Defense counsel relied upon all of this evidence to make the reasonable argument that defendant did not know such a small item, which weighed less than 0.2 grams, was in the small coin pocket of pants he had just purchased from a second-hand store. While the prosecutor pointed to defendant's evasive driving as further evidence that he knew the PCP was in his pocket, defense counsel confronted this evidence, and asserted the circumstances of defendant's arrest supported the opposing inference that defendant did not know the substance was in his pocket. Defense counsel introduced evidence that the

actual pursuit lasted about one minute and for one mile, defendant stopped at his own residence, two other people were in the vehicle, and defendant did not possess any drug paraphernalia. Counsel argued that if defendant was evading the officers because he knew about the PCP in his pocket, he had plenty of time to dispose of the item by tossing it from the car or giving it to one of his passengers. Instead, counsel argued a more reasonable explanation for defendant's alleged evasion of the officers was because he knew he was driving without a license. While defense counsel presented the jury with a tenable theory of the case, the trier of fact was entitled to and, in fact did, reject it.

Moreover, defense counsel did not initially concede the admissibility of Spencer's testimony and Kennedy's report. During Spencer's direct examination, the prosecutor asked introductory questions about the nature and circumstances of Kennedy's tests and the laboratory protocols, and then moved to introduce Kennedy's report into evidence. Defense counsel refused to submit the matter until she conducted cross-examination of Spencer. Counsel questioned Spencer about Kennedy's qualifications and whether Spencer supervised Kennedy's work and/or reviewed the results. Counsel apparently accepted Spencer's testimony and submitted the matter when the prosecutor again attempted to move Kennedy's report into evidence. Counsel's submission of the matter effectively amounted to a stipulation that the substance in defendant's pocket was PCP. But counsel relied upon the criminalist's report to further attack the accuracy of Officer Carruesco's testimony, since Carruesco thought the substance was methamphetamine whereas the test results showed it was PCP.

The entirety of the record thus demonstrates that defense counsel was not eager to focus the jury's attention on the fact that defendant was found in possession of PCP, and she made the tactical decision not to renew her objections to Spencer's testimony or Kennedy's report. Indeed, *Melendez-Diaz* acknowledged that defense attorneys routinely make tactical decisions not to raise Sixth Amendment objections to scientific evidence:

> "Defense attorneys and their clients will often stipulate to the nature of the substance in the ordinary drug case. It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis. Nor will defense attorneys want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion. . . . Given these strategic considerations, and in light of the experience in those States that already provide the same or similar protections to defendants, there is little reason to believe that our decision today will commence the parade of horribles [the State] and the dissent predict." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2542.)

Melendez-Diaz further observed that it did not expect defense attorneys "to refrain from zealous representation of their clients. We simply do not expect defense attorneys to believe that their clients' interests (or their own) are furthered by objections to analysts' reports

*Melendez-Diaz'*s comment upon reasonable defense tactics anticipated exactly what happened in this case. Defense counsel refused to stipulate to the prosecutor's initial attempt to introduce Kennedy's report. Instead, she questioned Spencer about the nature and circumstances of the tests performed by Kennedy, and made the reasonable tactical decision not to challenge the admissibility of the evidence to avoid focusing the jury's attention on the PCP found in defendant's pocket. Moreover, counsel conducted a vigorous defense and developed the theory that defendant did not know the item was in his pocket, based on cross-examination of the prosecution witnesses and the introduction of defense evidence. The dissent states we cannot speculate about defense counsel's tactical decisions and the record does not demonstrate she intentionally refrained from objecting to the introduction of this evidence. (Dis. opn. of Dawson, J. at p. 2.) We respectfully disagree given our review of the procedural history of this case.

We thus conclude defense counsel was not ineffective for failing to raise a Sixth Amendment objection to Spencer's testimony and Kennedy's report. Defense counsel made the tactical decision not to further challenge evidence that was not favorable to the

defendant and proceeded with a theory supported by the evidence, that defendant did not know what was in the pockets of a pair of pants he just purchased from a thrift store.

Melendez-Diaz and Geier

Finally, even if defense counsel's failure to object did not waive the Sixth Amendment issue, or counsel was ineffective for failing to object, we find counsel's omission was not prejudicial because *Melendez-Diaz* did not overrule *Geier*. There are important distinctions between the cases.[7] *Geier* relied on *Davis* and held that an expert could testify about the results of DNA tests, even if that expert did not conduct the actual tests, without violating the defendant's Sixth Amendment rights. In doing so, *Geier* explained "the crucial point" in *Davis*, in determining whether evidence is testimonial, is "whether the statement represents the contemporaneous recordation of observable events." (*Geier, supra,* 41 Cal.4th at p. 607.) *Geier* held the DNA report prepared in that case was admissible and not testimonial because it contained the analyst's observations as she actually performed the tests, and thus constituted "a contemporaneous recordation of observable events rather than the documentation of past events." (*Geier, supra*, 41 Cal.4th at p. 605.) In addition, the supervisor of the analyst who conducted the DNA tests and prepared the report testified in *Geier*, and was available for cross-examination as to the nature of the tests and review of the analyst's work. (*Geier, supra*, 41 Cal.4th at pp. 593-596.)

In contrast, *Melendez-Diaz* held the defendant's Sixth Amendment rights were violated in that case because of the admission of "'certificates of analysis'" (*Melendez-Diaz, supra,* 129 S.Ct. at pp. 2530-2531) containing "only the bare-bones statement" that the contraband at issue consisted of cocaine. (*Id*. at p. 2536.) The certificates were "quite plainly affidavits" that fell "within the 'core class of testimonial statements'" subject to

[7] We address defendant's Sixth Amendment argument assuming, without deciding, that *Melendez-Diaz* may be applied retroactively to this case.

the Sixth Amendment restrictions described in *Crawford*, and were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.' [Citation.]" (*Id.* at p. 2532.) No witness testified or was subject to cross-examination in *Melendez-Diaz* about any aspects of the tests conducted on the contraband, and there was absolutely no evidence introduced about "what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." (*Id*. at p. 2537.) These points were crucial in *Melendez-Diaz* because even though the laboratories purportedly used "'methodology recommended by the Scientific Working Group for the Analysis of Seized Drugs,' ….[a]t least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination. [Citations.]" (*Id*. at pp. 2537-2538.) Moreover, *Melendez-Diaz* acknowledged *Davis*'s distinction between contemporaneous and near-contemporaneous statements, and found it "doubtful" that the analyst's reports in *Melendez-Diaz* "could be characterized as reporting 'near-contemporaneous observations'" because the affidavits "were completed almost a week after the tests were performed. [Citation.]" (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2535.) We believe these are crucial distinctions in the court's analysis of testimonial statements, and that *Melendez-Diaz* did not undermine *Geier*'s reliance on *Davis*.

The instant case is also distinguishable from *Melendez-Diaz* because the prosecution's evidence as to the nature of the substance found in defendant's pocket was not introduced through a bare affidavit or certificate. Instead, Spencer, the supervising criminalist, testified at trial and was subject to cross-examination as to the nature of Kennedy's tests. Spencer had personal knowledge about the types of tests conducted on contraband, and explained the laboratory's protocols for conducting such tests. In contrast to *Melendez-Diaz*, Spencer extensively testified as to the chain of custody of the

substance found in defendant's pocket, the type of tests performed, and the steps involved in the testing process. She conducted her own independent review of Kennedy's work as part of her supervisorial duties, such that the defendant was well-aware "what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2537.) In addition, Spencer's testimony was based upon the notes compiled by Kennedy as she conducted the tests, and were thus a "contemporaneous recordation of observable events rather than the documentation of past events." (*Geier*, *supra*, 41 Cal.4th at p. 605.)

We also believe that to the extent that some aspects of Justice Scalia's four-vote plurality opinion in *Melendez-Diaz* may raise questions about the holding in *Geier*, it is necessarily tempered by Justice Thomas's concurrence, which supplied the necessary fifth vote. Justice Thomas's concurring opinion in *Melendez-Diaz* was based upon his concurring and dissenting opinion in *Davis*, and expressed his limited view that testimonial evidence consisted of extrajudicial statements "'only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.' [Citations.]" (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2543 (conc. opn. of Thomas, J.).) In the face of a strong dissent by four justices, Justice Thomas joined Justice Scalia's opinion in *Melendez-Diaz* only because "the documents at issue in this case 'are quite plainly affidavits,'" and fell within "'the core class of testimonial statements' governed by the Confrontation Clause. [Citation.]" (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2543 (conc. opn. of Thomas, J.).) Justice Thomas did not join in the wide-ranging statements in Justice Scalia's opinion that may appear to undermine *Geier*.

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that

position taken by those Members who concurred in the judgments on the narrowest grounds ….' [Citation.]" (*Marks v. United States* (1977) 430 U.S. 188, 193; see also *Panetti v. Quarterman* (2007) 551 U.S. 930, 949; *Del Monte v. Wilson* (1992) 1 Cal.4th 1009, 1023.) While the opinion in *Melendez-Diaz* may not be "fragmented," Justice Thomas supplied the "decisive" fifth vote and he concurred on grounds narrower than those put forth by the plurality. (See, e.g., *United States v. Brown* (5th Cir. 2008) 553 F.3d 768, 783.) As a result, his position takes on heightened significance in interpreting *Melendez-Diaz* and may be considered controlling. (See, e.g., *Romano v. Oklahoma* (1994) 512 U.S. 1, 9; *People v. Rios* (2009) 179 Cal.App.4th 491, 501-503; *Tily B., Inc. v. City of Newport Beach* (1999) 69 Cal.App.4th 1, 16; *Blanco v. Baxter Healthcare Corp.* (2008) 158 Cal.App.4th 1039, 1050, fn. 7.)

As we noted *ante*, the California Supreme Court has granted review in four published cases which reached contrasting conclusions as to whether *Melendez-Diaz* overruled *Geier*. However, the court recently denied review in *People v. Vargas* (2009) 178 Cal.App.4th 647 (*Vargas*), which held the statements of a sexual assault victim, made during a formal sexual assault examination, were testimonial hearsay and inadmissible. The dissent relies upon *Vargas* and states that "[w]ith its primary underpinnings rejected by *Melendez-Diaz*, it appears that *Geier* is no longer good law." (Dis. opn. of Dawson, J. at p. 3.) We respectfully disagree with the dissent's reliance on *Vargas*.

In *Vargas*, the victim reported that she had been sexually assaulted. She was later examined and questioned by a nurse, who conducted a sexual assault examination for law enforcement authorities. The nurse asked the victim specific questions, using questions listed on a state form, about the nature and circumstances of the sexual assault. The victim stated defendant orally copulated and digitally penetrated her. The victim did not testify at trial, and the prosecution moved to call the nurse to testify about the victim's statements. Defendant objected and argued the proposed evidence was testimonial under

Crawford and the Sixth Amendment. The court overruled the objection, and the nurse testified about the victim's statements which described the sexual assault. (*Id*. at pp. 652-654, 655.)

In addressing the admissibility of the victim's statements, *Vargas* began by reviewing the definitions of testimonial hearsay in *Crawford*, *Davis*, and *Geier*. (*Vargas*, *supra*, 178 Cal.App.4th at p. 653, 657-658.) *Vargas* also reviewed *People v. Cage* (2007) 40 Cal.4th 965 (*Cage)*, which held that a child abuse victim's statements to a physician, made while the physician was treating the victim's injuries, were not testimonial under *Crawford* and *Davis*, because the physician's primary purpose was to deal with a contemporaneous medical situation and not to obtain proof of a past criminal act. (*Cage*, *supra*, 40 Cal.4th at pp. 970-971; *Vargas*, *supra*, 178 Cal.App.4th at pp. 657-658.)

Vargas also reviewed *Melendez-Diaz*, which had been decided after the defendant's trial. *Vargas* acknowledged the potential conflict between *Melendez-Diaz* and *Geier*, and noted the limiting effect of Justice Thomas's concurrence:

> "The reasoning of the majority in *Melendez-Diaz* is inconsistent with the primary rationale relied upon by the California Supreme Court in *Geier* to uphold the introduction of the DNA report in that case--that because a scientific observation 'constitute[s] a contemporaneous recordation of observable events rather than the documentation of past events,' it is analogous to 'the declarant reporting an emergency in *Davis*' and therefore is not testimonial. [Citation.] In *Melendez-Diaz*, the majority dismissed the contention of the [state] and the four dissenters that there is a distinction, for Confrontation Clause purposes, between a 'conventional witness' who testifies to past events and is subject to confrontation, and the report of an 'analyst' who makes near-contemporaneous observations of neutral, scientific test results, and thus is not subject to confrontation. [Citation.] *Nonetheless, because of the limited nature of Justice Thomas' concurrence, the precedential value of the majority's analysis on this point is unclear as applied to a laboratory analyst's report or a similar forensic report, rather than to, in Justice Thomas' words, '"formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions*." [Citations.]'

[Citations.]" (*People v. Vargas, supra*, 178 Cal.App.4th at pp. 659-660, italics added.)

Vargas did not rely on *Melendez-Diaz* to resolve the admissibility of the sexual assault victim's statements to the nurse, but instead held the victim's statements were inadmissible "even under the view of testimonial hearsay" contained in *Cage* and *Geier*. (*Vargas, supra*, 178 Cal.App.4th at p. 660.) *Vargas* held the nurse's primary purpose when she examined and questioned the sexual assault victim was not to elicit information to render treatment or deal with a contemporaneous medical situation that required immediate information, and the nurse's report was not a "'contemporaneous recordation of observable events'" as in *Geier*. (*Id*. at pp. 661, 662.) *Vargas* held it was clear that the nurse examined and questioned the victim "for the primary purpose of documenting the nature of the sexual assault and gathering evidence for transmittal to the police and for possible later use in court." (*Id*. at p. 662.) The victim was informed that the purpose of the sexual assault examination was to discover and preserve evidence of the sexual assault, and the report would be release to law enforcement. (*Id*. at pp. 655, 660-661.) The nurse was acting as an agent of law enforcement because she questioned the victim using specific questions from a state form, which was a "statutorily mandated format designed to have [the victim] describe the specific sexual acts which she was forced to perform," such that the victim's statements were "like testimony" because "the interview was intended to make a record of past facts, and it certainly possessed at least 'some degree' of the formality and solemnity characteristic of testimony.'" (*Id*. at p. 661.) Since the victim was informed the results of the examination would be given to law enforcement, "any 'deliberate falsehoods' she gave in responding to [the nurse's] questions concerning the sexual assault might well have constituted a criminal offense." (*Id*. at p. 661.) *Vargas* held the erroneous introduction of the victim's statements was harmless as to defendant's conviction for forcible rape because there was independent evidence introduced as to that charge, but the court reversed defendant's conviction for

forcible penetration by a foreign object because the victim's statements constituted the only evidence of that count. *(Id*. at pp. 663-664.)

Given the entirety of the holding in *Vargas*, we respectfully disagree with the dissent's reliance on *Vargas* to find that *Geier* is inconsistent with and overruled by *Melendez-Diaz*. (Dis. opn. of Dawson, J. at p. 3.) *Vargas* acknowledged the potential conflict between the cases but believed Justice Scalia's plurality opinion in *Melendez-Diaz* was limited by Justice Thomas's concurrence, and expressly declined to determine whether *Geier* had been overruled as to the admissibility of reports from laboratory analysts. (*Vargas*, *supra*, 178 Cal.App.4th at p. 659.) Instead, *Vargas* relied on *Cage* and *Geier* and found the sexual assault victim's statements to the nurse "'occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony,'" consistent with Justice Thomas's description of testimonial evidence in his concurrence in *Melendez-Diaz*. (*Vargas*, *supra*, 178 Cal.App.4th at pp. 660-661.)

We thus conclude that even if defense counsel did not waive review of the Sixth Amendment issue, and counsel was ineffective for failing to object, any error is not prejudicial because *Melendez-Diaz* did not overrule *Geier*.

II. The Trial Court Did Not Abuse Its Discretion When It Declined To Dismiss The Prior Strike Convictions

As to count 1, felony possession of a controlled substance, the court found true the special allegations that defendant suffered two prior serious and/or violent felony convictions within the meaning of the Three Strikes law: second degree robbery (Pen. Code, § 212.5, subd. (b)) and kidnapping (Pen. Code, § 207, subd. (a)), both committed in 1993. Defendant contends the court abused its discretion when it imposed the third strike term of 25 years to life and denied his request to dismiss one or both prior strike convictions pursuant to Penal Code section 1385.

Penal Code section 1385 grants trial courts the discretion to dismiss a prior strike conviction if the dismissal is in furtherance of justice. (Pen. Code, § 1385, subd. (a); *Romero, supra,* 13 Cal.4th at pp. 529-530.) In deciding whether to dismiss a prior strike conviction, the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The trial court's decision not to dismiss a prior strike conviction is reviewed under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).) An abuse of discretion is established by demonstrating the trial court's decision is "irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) When the record shows the trial court considered relevant factors and acted to achieve legitimate sentencing objectives, the court's decision will not be disturbed on appeal. (*Ibid*.)

At the sentencing hearing, the court considered defendant's post-trial request to dismiss one or both prior strike convictions, and extensively reviewed his criminal history as set forth in the probation report. In 1993, defendant was convicted in Santa Clara County of the two prior strike convictions, second degree robbery and kidnapping, and sentenced to three years in prison. In March 1995, he was released on parole. In January 1999, he violated parole. In February 1999, he was again released on parole. In March 1999, he was discharged from parole.

Defendant also suffered numerous misdemeanor convictions in Kern County. In 1997, defendant was convicted of possession of narcotics paraphernalia (Health & Saf.

Code, § 11364) and willful violation of a promise to appear (Pen. Code, § 853.7). He was placed on misdemeanor probation for three years and ordered to serve 60 days in jail. In 1999, defendant was convicted of driving under the influence (Veh. Code, § 23152, subd. (a)) and driving on a suspended or revoked license (Veh. Code, § 14601.1, subd. (a)), and placed on misdemeanor probation for three years and ordered to serve 60 days in jail.

In June 2000, defendant was convicted of driving on a suspended or revoked license and unlawfully driving or taking a vehicle (§ 10851, subd. (a)), and placed on misdemeanor probation for three years and service of jail time. In September 2000, he violated probation because he failed to install an ignition interlock device in his vehicle. In December 2001, he was reinstated on probation with five days in jail.

In December 2001, defendant was convicted of misdemeanor possession of less than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd. (b)) and sentenced to five days in jail. In April 2002, he was convicted of driving on a suspended or revoked license and willfully violating his promise to appear (§ 40508, subd. (a)), placed on misdemeanor probation for three years, and ordered to serve 20 days in jail. In June 2002, he violated probation by failing to appear, and probation was reinstated with 20 days in jail. In August 2002, he again violated probation by failing to appear, and probation was again reinstated with 20 days in jail.

In June 2002, defendant was convicted of driving on a suspended or revoked license and operating a vehicle without a functioning interlock ignition device while his driving privilege was restricted (§ 23247, subd. (e)). He was placed on misdemeanor probation for three years and ordered to serve 40 days in jail. In August 2002, he violated probation by failing to appear, probation was reinstated, and he was ordered to serve 40 days in jail.

In December 2002, December 2003, and November 2004, defendant was charged with separate violations of driving on a suspended or revoked license. In March 2006, he

was placed on misdemeanor probation and ordered to serve 45 days in jail. In May 2006, he violated probation by failing to appear and probation was reinstated. In April 2006, he was charged in Tulare County with driving on a suspended or revoked license, and a bench warrant was issued. Defendant was not on misdemeanor probation at the time he committed the instant offenses, but he had failed to appear in three misdemeanor cases "all relating to driving with a suspended license which took place over a two year period of time between 2002 and 2004." Defendant admitted to the probation officer that he previously drank alcohol and used marijuana, methamphetamine, and PCP, but said he had not used those substances for five years prior to his arrest.

The trial court herein declined to dismiss one or both prior strike convictions and found that "following his two strike convictions in 1993, there has been no significant period of time where the defendant has led a crime-free life." The court stated:

> "And the description of a revolving-door defendant I think must be applied to this defendant. And he has had a long-standing string of convictions. I appreciate that all of them are misdemeanors following the 1993 offense. But they are for a variety of offenses including theft, flagrant violations of the Vehicle Code, given the numerous Vehicle Code violations, driving under the influence, the possession of marijuana. And the defendant has basically led a continuous life of crime after those priors, when I look at his entire record."

The court acknowledged it had discretion to dismiss one or both strikes:

> "[The cases] do not hold that a defendant's criminal career must consist entirely or principally of violent or serious felonies to bring a defendant within the spirit of the Three Strikes law. The Three Strikes law only requires that a defendant be convicted of a current felony and have one or more prior serious or violent felony convictions.
>
> "And since only one qualifying felony is required to trigger a longer sentence, the virtually uninterrupted commission of additional nonqualifying felonies over a lengthy period of time cannot logically act as mitigation so as to take the defendant outside the spirit of the scheme in which he literally falls. And I do find in this case that the defendant does

have a lengthy and continuous criminal history; that he does not fall outside the scheme spirit."

Defendant argues the court abused its discretion when it denied his request to dismiss the prior strike convictions because he is not "a career criminal who makes his living preying on others and should not be treated as if he were." Defendant argues his current conviction for possession of a controlled substance was a "low-grade" felony, it could have been treated as a misdemeanor, it involved a minimal amount of narcotics, and he would have been eligible for probation but for his two prior strike convictions.

The entirety of the record reflects the court did not abuse its discretion when it denied defendant's request to dismiss the prior strike convictions. While defendant's felony record was limited to the two prior strike convictions for kidnapping and robbery, the trial court herein aptly noted defendant's nearly continuous record of misdemeanor driving offenses, which were not limited to minor traffic infractions. Instead, he repeatedly demonstrated his refusal to comply with the law based upon his numerous convictions for driving on a suspended or revoked license, driving a vehicle without complying with the court's order to install an ignition interlock device, ongoing probation violations by continuing to drive in violation of law, and failing to appear and serve the most lenient of local time commitments. As in *People v. Gaston* (1999) 74 Cal.App.4th 310, 322, defendant herein has clearly received "a number of breaks and has benefited from none of them." Moreover, the court's decision not to dismiss his prior strike convictions is not rendered an abuse of discretion merely because defendant's prior felony convictions occurred in 1993, or his subsequent offenses were misdemeanors. (See, e.g., *People v. Strong* (2001) 87 Cal.App.4th 328, 338-339, and cases cited there.)

In his request to dismiss his prior strike convictions filed with the trial court, defendant argued that both prior strike convictions were based on "a single period of aberrant behavior for which he served a single prison term nearly a decade and a half ago," and the court should exercise its discretion to dismiss one or both prior convictions

because the two offenses were "so closely connected" within the meaning of *People v. Benson* (1998) 18 Cal.4th 24 (*Benson*), and *People v. Burgos* (2004) 117 Cal.App.4th 1209 (*Burgos*).

Defendant's argument was based on *Benson,* which held that a prior conviction for which the sentence was stayed under section 654 may also be treated as a strike. (*Benson, supra,* 18 Cal.4th at p. 31.) However, *Benson* left open the possibility that the trial court had discretion to dismiss a prior strike conviction in situations "in which two prior felony convictions are so closely connected--for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct--that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors." (*Id*. at p. 36, fn. 8.)

Burgos relied on *Benson* and held that "where the two priors were so closely connected as to have arisen from a single act, it would necessarily constitute an abuse of discretion to refuse to strike one of the priors." (*Burgos, supra,* 117 Cal.App.4th at p. 1215.) *Burgos* held the trial court in that case should have dismissed one of defendant's two prior convictions because they were "'so closely connected'" and arose from the "same single act." (*Id*. at p. 1216.) *Burgos* further held there were no other circumstances indicating the defendant in that case deserved to be sentenced as a third strike offender. (*Id*. at pp. 1216-1217.)

We note that *Burgos* did not hold that a trial court automatically abuses its discretion when it declines to dismiss one of two prior strike convictions that arose from the same act or course of conduct. Instead, the trial court has broad discretion to consider many factors in its determination whether to dismiss a prior strike conviction. (*Carmony, supra,* 33 Cal.4th at pp. 377-378; see also *People v. Ortega* (2000) 84 Cal.App.4th 659, 667-669.) The "'same act' circumstances … provide a factor for a trial court to consider,

but do not *mandate* striking a strike." (*People v. Scott* (2009) 179 Cal.App.4th 920 [101 Cal.Rptr.3d 875, 882], italics in original.)

In any event, while defendant's prior record might appear to place him within the ambit of *Benson* and *Burgos*, he failed to present any evidence as to the underlying facts of his two prior strike convictions. The entirety of the record simply states that on October 19, 1993, in Santa Clara Superior Court case No. 168171, he pleaded guilty to kidnapping and second degree robbery, and on November 10, 1992, he was sentenced to the lower term of three years for kidnapping and a concurrent lower term of two years for robbery. There is no clear evidence in the record that defendant's convictions for kidnapping and robbery were so closely connected and arose out of a single act that one of prior convictions should have been dismissed under section 1385.

The trial court herein was aware of its discretion and carefully reviewed the defendant's criminal record. Based on the record before it, we cannot hold that as a matter of law the trial court abused its discretion in denying defendant's request to dismiss his prior strike convictions.

III. Cruel and/or Unusual Punishment

Defendant renews the argument which was raised and rejected at the sentencing hearing, that the imposition of an indeterminate third strike term of 25 years to life for the felony offense of possession of a controlled substance constitutes cruel and/or unusual punishment in violation of the United States and California Constitutions.

The purpose of the Three Strikes law is not to subject a criminal defendant to a life sentence merely on the basis of the latest offense. Rather, the purpose is to punish recidivist behavior. (*People v. Diaz* (1996) 41 Cal.App.4th 1424, 1431; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630-1631.) Habitual offender statutes have withstood constitutional scrutiny based on assertions of cruel and unusual punishment, as well as claims of a disproportionate sentence. (See *People v. Ayon* (1996) 46 Cal.App.4th 385,

398-400, overruled on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 593-595, 600.)

Defendant argues that aside from his two prior strikes, his criminal record and the instant offenses involved nonviolent and victimless crimes. However, "society's interest in deterring criminal conduct or punishing criminals is not always determined by the presence or absence of violence. [Citations.] [Defendant's] intractable recidivism, coupled with his current offense[s], justify the term imposed." (*People v. Cooper* (1996) 43 Cal.App.4th 815, 826.) Moreover, defendant is being punished not merely for the current offense but also because of his recidivism. (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1432.) In evaluating the factors set forth in *In re Lynch* (1972) 8 Cal.3d 410, defendant's sentence is not so disproportionate to the crime that it shocks the conscience, and it does not violate the state constitutional prohibition against cruel or unusual punishment. (See *People v. Stone* (1999) 75 Cal.App.4th 707, 715; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510-1517; *People v. Cooper, supra,* 43 Cal.App.4th 815, 825-828; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1337-1338.)

In addition, defendant cannot demonstrate that his sentence violates the prohibition against cruel and unusual punishment contained in the federal Constitution. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 66-67, 77 (*Andrade*); *Ewing v. California* (2003) 538 U.S. 11, 29-31(*Ewing)*; *People v. Cooper, supra,* 43 Cal.App.4th at pp. 820-825.) In *Ewing*, the United States Supreme Court held that the cruel and unusual punishment clause of the federal Constitution contains a narrow proportionality principle that prohibits grossly disproportionate sentences. (*Ewing, supra*, 538 U.S. at p. 23.) The court upheld a 25-year-to-life sentence under the Three Strikes law for a defendant with prior burglary and robbery convictions who shoplifted three golf clubs. (*Id*. at pp. 17-18, 29-31; see also *Andrade, supra,* 538 U.S. at pp. 66-68, 77 [two consecutive terms of 25 years to life under Three Strikes law for thefts of videotapes not grossly disproportionate].)

Defendant contends his situation is similar to that addressed in *People v. Carmony* (2005) 127 Cal.App.4th 1066, where the court found a third strike sentence of 25 years to life imposed for the defendant's failure to reregister as a sex offender violated both the federal and state constitutional prohibitions against cruel and/or unusual punishment. In doing so, the court emphasized that defendant had in fact registered, and his failure to reregister was a purely technical violation with no practical effect. (*Id.* at p. 1078.) "Here, there was no new information to update and the state was aware of that fact. Accordingly, the requirement that defendant reregister within five days of his birthday served no stated or rational purpose of the registration law and posed no danger or harm to anyone." (*Id.* at p. 1073.) "Because a 25-year recidivist sentence imposed solely for failure to provide duplicate information is grossly disproportionate to the offense, shocks the conscience of the court and offends notions of human dignity, it constitutes cruel and unusual punishment under both the state and federal Constitutions." (*Ibid.*) The court specifically declined to consider "the appropriateness of a recidivist penalty when the predicate offense does not involve a duplicate registration." (*Id.* at p. 1073, fn. 3.)

In contrast to *People v. Carmony*, *supra*, 127 Cal.App.4th 1066, defendant's convictions in the instant case were not technical violations of the law that "served no stated or rational purpose." *(Id.* at p. 1073.) Defendant's case is clearly within the parameters set by *Ewing* and *Andrade*. As in those cases, "[i]f terms of 25 years to life and 50 years to life are not '"grossly disproportionate"' for petty theft with prior felony convictions," then the indeterminate term imposed here is not grossly disproportionate to the offense of possession of a controlled substance, given defendant's criminal history, including the prior strike convictions, numerous periods of incarceration in county jails, and repeated failures to appear and probation violations. (*People v. Em* (2009) 171 Cal.App.4th 964, 977; see *Andrade, supra,* 538 U.S. at p. 77; *Ewing, supra*, 538 U.S. at pp. 28-30; *People v. Romero, supra,* 99 Cal.App.4th at pp. 1432-1433.)

DISPOSITION

The judgment is affirmed.

_____
Poochigian, J.

I CONCUR:

_____
Hill, J.

DAWSON, Acting P.J.

I dissent and would remand this case for a new trial on count 1. The majority finds (1) that defense counsel forfeited the Sixth Amendment claim by failing to object and (2) that defense counsel made a tactical decision to refrain from objecting and thus waived the Sixth Amendment claim. I disagree as to both of these points. I also disagree with the majority's view that no Sixth Amendment error occurred.

FORFEITURE

The answer to the question of forfeiture in this case is controlled by the California Supreme Court's opinion in *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*). As stated there, "An objection in the trial court is not required if it would have been futile. (See *People v. Welch* (1993) 5 Cal.4th 228, 237–238.)" (*Id.* at p. 837, fn. 4.) Here neither the plaintiff nor the majority contest the point that an objection by defense counsel below would have been futile. The trial court would have been required to overrule the objection by the California Supreme Court's controlling opinion in *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*). (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The majority avoids the holding in *Sandoval* by resort to the view that the eventual holding of *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. __ [129 S.Ct. 2527] (*Melendez-Diaz*) was foreseeable at the time this case was tried, which was after the decision in *Crawford v. Washington* (2004) 541 U.S. 36. But that is precisely the argument that was rejected in *Sandoval*. (*Sandoval, supra*, 41 Cal.4th at p. 837, fn. 4 [rejecting rationale that forfeiture should be found because "counsel in many other cases" foresaw the development of law contrary to the controlling California Supreme Court case and raised the issue in the trial court].) It is an argument that is pertinent in a different situation—where defense counsel has failed to foresee a new development in the law. This case, like *Sandoval*, "is in a different posture." (*Sandoval, supra,* at p. 837, fn. 4.) Here, as in *Sandoval*, trial and sentencing occurred after a United States Supreme

Court opinion (here *Crawford*, there *Blakely*[1]) and a California Supreme Court opinion applying the former (here *Geier*, there *Black*[2]). The California Supreme Court opinion in *Black* was binding on the trial court in *Sandoval*, just as the opinion in *Geier* was binding on the trial court here. We in turn are bound by the holding in *Sandoval* to find no forfeiture occurred here.

TACTICAL CHOICE

The majority rejects defendant's alternative argument—that defense counsel was incompetent in failing to object—on the basis that counsel made a tactical choice to refrain from objecting. First, I do not agree that the record demonstrates that counsel intentionally refrained from objecting. At most, we can speculate from the record that she did so. In such circumstances, we should not decide the issue on direct appeal.

In any case, I do not see how defense counsel had a tactical choice to make. I quote Justice John Paul Stevens:

> "A decision cannot be fairly characterized as 'strategic' unless it is a conscious choice between two legitimate and rational alternatives. It must be borne of deliberation and not happenstance, inattention or neglect." (*Wood v. Allen* (Jan. 20, 2010, No. 08-9156) __ U.S. __, __ [175 L.Ed.2d 738, 751] (dis. opn. of Stevens, J.).)

At the time counsel here failed to object, she had no basis to do so. She thus should not be said to have made a conscious choice between two legitimate alternatives.

The failure to object here should be examined by reference to the appropriate analysis—futility.

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[1] *Blakely v. Washington* (2004) 542 U.S. 296.

[2] *People v. Black* (2005) 35 Cal.4th 1238.

SIXTH AMENDMENT ERROR

First, I note that plaintiff does not contend, at least in plaintiff's brief, that error did not occur under *Melendez-Diaz*. Though plaintiff did so contend at oral argument, we normally do not consider contentions made for the first time there. (See *People v. Pena* (2004) 32 Cal.4th 389, 403 and cases cited therein.)

Second, I believe that *Geier* is inconsistent with and therefore overruled by *Melendez-Diaz*. As noted recently in *People v. Vargas* (2009) 178 Cal.App.4th 647,

> "The reasoning of the majority in *Melendez-Diaz* is inconsistent with the primary rationale relied upon by the California Supreme Court in *Geier* to uphold the introduction of the DNA report in that case—that because a scientific observation 'constitute[s] a contemporaneous recordation of observable events rather than the documentation of past events,' it is … not testimonial. (*Geier*, *supra*, 41 Cal.4th at pp. 605–606.) In *Melendez-Diaz*, the majority dismissed the contention of the respondent and the four dissenters that there is a distinction, for confrontation clause purposes, between a 'conventional witness' who testifies to past events and is subject to confrontation, and the report of an 'analyst' who makes near contemporaneous observations of neutral, scientific test results, and thus is not subject to confrontation. (*Melendez-Diaz*, *supra*, 557 U.S. at pp. ___–___ [129 S.Ct. at pp. 2535–2540].)" (*People v. Vargas*, *supra*, at p. 659.)

With its primary underpinnings rejected by *Melendez-Diaz*, it appears that *Geier* is no longer good law.

Third, there can be no question of prejudice here, as the evidence presented in violation of the Sixth Amendment was the only evidence demonstrating that the substance possessed was in fact a controlled substance. (*People v. Vargas*, *supra*, 178 Cal.App.4th at pp. 662–663.)

Therefore, defendant's conviction on count 1 should be reversed.

_____

DAWSON, Acting P.J.